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In the

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and the ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Eleventh Amendment bar suits by private citizens in federal court under the Americans with Disabilities Act against unconsenting states?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners the University of Alabama at Birmingham, *et al.* Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of the Court.

PLF was founded 26 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. As a nonprofit public interest foundation incorporated under the laws of California, PLF litigates matters affecting the public interest at all levels of state and federal courts. PLF represents the views of thousands of supporters nationwide and is an advocate for limited government, individual rights, and free enterprise. PLF supports the concepts of federalism and limited government and believes public officials must be respectful of the constitutional limitations on federal power.

This case is another example of Congress' myriad attempts to expand federal power beyond what is provided under the United States Constitution. How this Court answers the questions raised in this case will determine the scope of congressional power and can reenforce that Congress may not amend the Constitution through ordinary legislation. PLF has a long history of amicus curiae participation in this Court and believes its perspective on the need for limiting Congress to its enumerated powers will provide a necessary viewpoint on the issues presented in this case.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Respondent Patricia Garrett was employed by the University of Alabama at Birmingham. *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214, 1219 (11th Cir. 1999). In August of 1994, she was diagnosed with breast cancer. *Id.* She underwent a lumpectomy and also underwent chemotherapy and radiation treatment until January of 1995. *Id.* During this time, the University repeatedly indicated its intent to transfer her to a less demanding position. *Id.* In March, 1995, on her doctor's orders, she took family medical leave. *Id.* When she returned, the University demoted her to a position with a lower salary. *Id.*

She subsequently filed suit against the University under the Americans with Disabilities Act, the Rehabilitation Act, and the Family Medical Leave Act. *Garrett v. Board of Trustees of the University of Alabama in Birmingham*, 989 F. Supp 1409, 1410 (N.D. Ala. 1998). The trial court granted summary judgment in favor of the University on all three claims, holding that the University, as an arm of the state, is immune from suit in federal court. *Id.* at 1412. On appeal, in a consolidated case, the Eleventh Circuit followed its own precedent, holding that states are not immune from suit under the Americans with Disabilities Act. *Garrett*, 193 F.3d at 1218. It also held that states are not immune from suit under the Rehabilitation Act, but affirmed the dismissal of the Family Medical Leave Act claim on sovereign immunity grounds. *Id.* at 1218, 1220.

On April 17, this Court granted the University's petition for writ of certiorari to resolve a conflict in the circuits. *University of Alabama at Birmingham Board of Trustees v. Garrett*, 120 S. Ct. 1669 (2000). The Court has limited its review to one question: Does the Eleventh Amendment bar suits by private citizens in federal court under the Americans with Disabilities Act against unconsenting states? *Id.*

SUMMARY OF ARGUMENT

This Court's precedents have established that, where Congress is legislating pursuant to its Article I powers and applies such legislation to the states, Congress lacks the authority to abrogate state sovereign immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). But when Congress is acting pursuant to its Fourteenth Amendment authority, it may validly abrogate state sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 637 (1999) (*Florida Prepaid*).

The Respondents have brought a case against an arm of the State of Alabama under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq*., a federal statute. *Garrett*, 193 F.3d at 1216. The State of Alabama has asserted that it is immune from suit. *Id.* Consequently, this case turns on the question of whether the ADA has been enacted under the Commerce Clause of Article I, in which case Congress may not abrogate sovereign immunity, or under Section 5 of the Fourteenth Amendment, in which case the Respondents' case may go forward.

As this Court explained in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Section 5 grants to Congress the power to enforce, by appropriate legislation, the rights guaranteed to citizens under the Fourteenth Amendment. *Id.* at 519; U.S. Const. amend. XIV. Inherent within this grant is an affirmative limitation. Specifically, Congress lacks authority to define the substantive contours of Fourteenth Amendment rights; rather, its enactments may only enforce those rights which exist under the Constitution. *Boerne*, 521 U.S. at 519. In *Boerne*, this Court explained that appropriate enforcement legislation is defined by whether the legislation in question is remedial and whether the remedy created by Congress is both congruent and proportional to the unconstitutional behavior sought to be

arrested. *Id.* at 520. As demonstrated here, the ADA does not conform to these standards.

The legislative history of the ADA shows that, while Congress was conscious of the difficulties faced by the disabled, it identified no unconstitutional state action directed at the disabled that demanded a federal remedy through Section 5. Indeed, Congress specifically recognized that, in some arenas, states were making great strides in addressing the special needs of the disabled. Accordingly, the Act itself is not directed at remedying state-sponsored discrimination against the disabled.

Though there are undoubtedly occasions on which the disabled face discrimination that violates the Equal Protection Clause of the Fourteenth Amendment, the ADA, in practice, does more than address unconstitutional discrimination against the disabled. Notwithstanding the ADA's laudable intentions, it does not seek to remedy those instances where state laws or conduct can be said to irrationally or invidiously discriminate against the disabled; rather, it requires states to affirmatively compensate for disabilities that, as a practical matter, present actual impediments to performance or capability. Instead of establishing a level playing field, the ADA, in effect, amounts to a special entitlement for the disabled.

The glut of federal cases that have arisen in the aftermath of the ADA's enactment demonstrate the clear incongruence and disproportionality between the discrimination addressed by the ADA and that subject to attack under the Equal Protection Clause. The rights the ADA vests in the disabled are entirely creatures of statute and bear little or no resemblance to constitutional rights recognized by this Court.

The Equal Protection Clause of the Fourteenth Amendment guarantees that individuals similarly situated are treated equally under the law, and Section 5 gives Congress the power to enact legislation that enforces this guarantee. But the

Equal Protection Clause has never been construed to place an affirmative obligation upon states to compensate individuals for their own natural disabilities, or to make up for social or economic hardships faced by the disabled as a consequence, however unfortunate, of these disabilities. Equating the goals of the ADA with the constitutional principle of Equal Protection would work a substantial change in constitutional construction at odds with the Equal Protection precedents of this Court. Thus, the ADA cannot be said to be a valid enactment under Section 5 to enforce the provisions of the Fourteenth Amendment. Accordingly, this Court should dismiss this case on the grounds that the State of Alabama is immune from suit.

ARGUMENT

I

SECTION 5 OF THE FOURTEENTH AMENDMENT IS THE ONLY PROVISION OF THE CONSTITUTION WHICH GRANTS CONGRESS AN EXPLICIT POWER TO ABROGATE STATE SOVEREIGN IMMUNITY, AND CONGRESS MAY ONLY USE ITS SECTION 5 POWER WHERE ITS LEGISLATION IS DIRECTED AT AND APPROPRIATE FOR REMEDYING OR PREVENTING A STATE'S DEPRIVATION OF AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS

A. In Order to Prevail on Their Claim of Sovereign Immunity, the Petitioners Must Show That the ADA Is Not a Valid Section 5 Enactment

The Eleventh Amendment embodies an affirmative limitation on federal power when Congress seeks to enact legislation directed at the states. *See generally Seminole Tribe*, 517 U.S. 44; *Alden v. Maine*, 527 U.S. 706 (1999). Specifically, the Eleventh Amendment evidences the constitutional design that states, as sovereigns independent from the federal government, are immune from suits by their

own citizens, and Congress has limited power to abrogate this immunity for the purpose of serving federal ends.[2] *Seminole Tribe*, 517 U.S. at 72; *Alden*, 527 U.S. at 712.

A key exception to limits on the federal power to abrogate state sovereign immunity is Congress' authority to enforce the provisions of the Fourteenth Amendment to the United States Constitution. *Fitzpatrick v. Bitzer*, 427 U.S. at 456, *Florida Prepaid*, 527 U.S. at 630. Section 5 of the Fourteenth Amendment granted Congress the power to direct legislation toward the states for the express purpose of enforcing the provisions of that Amendment, and necessarily includes within it the power to abrogate state sovereign immunity. *Fitzpatrick*, 427 U.S. at 456. As a result, when a state asserts as a defense to a federal claim that it is immune from suit, it becomes necessary to inquire whether the federal statute at issue was passed pursuant to Congress' Article I powers or Congress' power under Section 5 of the Fourteenth Amendment.

At issue in this case is the ADA. The purpose of this federal statute is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In passing this law, Congress invoked both its Article I commerce power and its enforcement power under Section 5 of the Fourteenth Amendment. *Id.* at § 12101(b)(4). While the State of Alabama does not challenge the validity of the ADA insofar

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[2] As this Court explained in *Alden*, state immunity from suit in federal court is not limited to the narrow range of cases described by the Eleventh Amendment, but instead evinces a broader notion of state sovereign immunity that is inherent in the design of the Constitution. *Alden*, 527 U.S. at 711-30. However, an assertion of state sovereign immunity is generally referred to as an assertion of Eleventh Amendment immunity.

as it regulates commerce, the state does contend that the ADA does not enforce the Equal Protection Clause.[3]

In *City of Boerne v. Flores*, this Court firmly established that Congress' Section 5 enforcement powers were bound by the language of the Fourteenth Amendment itself; specifically, Congress' power extended only so far as the enforcement of constitutional rights protected by the Fourteenth Amendment, and did not extend to defining those rights. *Boerne*, 521 U.S. at 519. Accordingly, in assessing the validity of legislation alleged to be a Section 5 enactment, the analysis necessarily entails looking at the scope of the constitutional right as defined by this Court and comparing that to what the federal legislation seeks to address. And while there does not need to be an exact "fit" between the conduct the legislation reaches and what the Constitution protects in order to be valid under Section 5, *id.* at 518, the legislation must be directed at remedying or preventing a state's violation of constitutional rights, *id.* at 524-25; *see also Florida Prepaid*, 527 U.S. at 638; *College Savings*, 527 U.S. at 672. Further, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. If it does not meet these standards, the legislation cannot be said to be "enforcing" the provisions of the Fourteenth

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[3] In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), this Court expressly refused to decide the issue of whether the ADA was valid under either Section 5 or the Commerce Clause. *Id.* at 213. *Yeskey* dealt with the application of the ADA to a prisoner who claimed rights under the ADA regarding his treatment by the state prison system. *Id.* at 208. Should this Court find that the ADA is only valid as a Commerce Clause enactment, it is doubtful that claims like Yeskey's could survive as a valid application of Congress' power to regulate interstate commerce. *See generally United States v. Morrison*, 120 S. Ct. 1740 (2000).

Amendment but is, instead, substantive: it creates a federal statutory right, but does not enforce a constitutional one.

B. In Deliberating Upon the ADA, Congress Made No Specific Findings That States Were Unconstitutionally Infringing Upon The Equal Protection Rights of the Disabled

The first inquiry in determining whether the ADA is remedial is whether Congress made any findings that states have systematically violated the constitutional rights of the disabled as defined by this Court, *Boerne*, 521 U.S. at 530, and second, whether the ADA itself is directed at remedying or preventing such violations:

> [T]o invoke § 5, [Congress] must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.

Florida Prepaid, 527 U.S. at 639, *see also id.* at 639-40 ("Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'") (citing *Boerne*, 521 U.S. at 525); *Florida Prepaid*, 527 U.S. at 640 (Patent Act was not remedial where Congress had not identified any evidence of widespread violation of patent laws by the states); *Boerne*, 521 U.S. at 530-31 (Religious Freedom Restoration Act was not a remedial where Congress had made no findings of deliberate religious persecution by the states). Accordingly, the first question in determining whether an enactment is valid under Section 5 is whether Congress intended it to be remedial.

Because the ADA addresses both private and state conduct, it is somewhat difficult to distinguish what discriminatory acts, specifically, Congress was focusing on with respect to the states. However, certain provisions of the

ADA are directed solely at states and their political subdivisions. *See* 42 U.S.C. §§ 12132, 12142. Consequently, Congress did examine state conduct in deliberating upon the provisions of the ADA.

As elaborated below, Congress found that, contrary to state and local governments being indifferent or hostile to the needs of the disabled, states were in fact already making great strides in integrating the disabled into the everyday life of the citizenry by increasing access to public accommodations and attempting to meet their special needs through the provision of extraordinary services. Thus, even in 1985, this Court recognized that many states had taken affirmative steps to help the mentally infirm:

> [T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice . . . .

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 443 (1985). Congress did not find otherwise with respect to other disabled individuals.

For example, a primary goal of the ADA is to address the transportation needs of the disabled and, specifically, transportation provided by public entities. *See* 42 U.S.C. §§ 12141-12161. Thus, Section 222 of the Act makes it a violation of the Act for a public entity with a fixed-route public transportation system to purchase or lease a new or used bus unless the bus is accessible to and usable by the disabled, including those who use wheelchairs. 42 U.S.C. § 12142. This portion of the Act also contains provisions wherein, with limited exceptions, a public entity that provides other public transportation services, including paratransit services specifically for the disabled, must provide the disabled a level

of transportation service that is at least equal to that provided for the nondisabled. *See, e.g.*, 42 U.S.C. §§ 12143(a), 12144. Yet the House Report from the Committee on Public Works and Transportation revealed that this "remedy" merely continued the work already begun by the states:

> By the mid-1990's many American cities will have completely accessible fixed route systems. Furthermore, many of the transit systems in America already provide some type of paratransit services to the disabled. *So, the passage of the ADA will not break sharply with existing transit policy.*

H.R. Rep. No. 101–485(I) at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 268 (emphasis added). As pointed out by minority members in the House, most major cities had already addressed these transportation needs: 80% of Seattle's buses were lift-equipped, as were 50% of Milwaukee's and nearly 100% of New York City's—even though the need for this special accommodation was extremely low: less than once per day for the entire Seattle bus system, which had the highest disabled ridership level in the country. *Id.* at 62, *Minority Views of Mr. Bud Shuster, et al.*, *reprinted in* 1990 U.S.C.C.A.N. 267, 300.

In short, with respect to meeting the transportation needs of the disabled—a primary goal of the ADA—there was no unconstitutional discrimination for Congress to remedy or prevent. On the contrary, far from finding that states were irrationally discriminating against the disabled, Congress found that many state and local transit systems had embarked on programs designed specifically to aid the disabled despite the fact that the disabled accounted for only a small fraction of their ridership. Even more, some members of the House of Representatives contended that the mandates imposed by the ADA would counteract state and local efforts to serve the transportation needs of the disabled because the ADA would force local systems to alter their existing programs to conform

to federal, one-size-fits-all, standards and abandon effective programs simply because they were nonconforming. *See id.* at 58-59, *Additional Views of Mr. John Paul Hammerschmidt, et al., reprinted in* 1990 U.S.C.C.A.N. 267, 297. Thus, while Congress was concerned about *increasing* access for the disabled to make public transit universally available, there is no indication that the Act was intended to remedy unconstitutional conduct by public transit systems.

The only other provision of the Act that is directed solely at the states is Section 202, a blanket provision that is uncommonly broad, even for Congress:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Indeed, the breadth of this provision is so marked that the House Report from the Committee on Education and Labor explains it by flatly stating:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination" . . . because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act, which applies only to federally funded programs] *to all actions of state and local governments.*

H.R. Rep. No. 101–485(II) at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.[4] But though the House Report indicates its intentions, it does not tie these intentions to any greater motivation than the goal of making public services more

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[4] *See also Yeskey*, 524 U.S. at 211-12 (noting the breadth of this provision).

accessible to the disabled—certainly not to a need to remedy state-sponsored discrimination against the disabled in violation of their constitutional rights.

Given that Section 202 of the Act reaches virtually every facet of state conduct, it is remarkable, in terms of invoking its Section 5 authority, that Congress did not support it by findings that such a far-reaching remedy was required to address unconstitutional discrimination by the states against the disabled. According to the House Report by the Committee on Education and Labor, the need for Section 202 was explained in total:

> Currently, Title V of the Rehabilitation Act of 1973 prohibits recipients of Federal assistance from discriminating against individuals with disabilities. Many agencies of State and local government receive Federal aid and thus are currently prohibited from engaging in discrimination on the basis of disability. However, where there is no state law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently than others who don't have disabilities. The resulting inconsistent treatment of people with disabilities by different State or local government agencies *is both inequitable and illogical for a society committed to full access for people with disabilities*.

Id. at 37, *reprinted in* 1990 U.S.C.C.A.N. 303, 318-19 (emphasis added).[5] However true, this statement hardly amounts to an indictment that states were infringing upon the constitutional rights of the disabled.[6]

The House Report from the Committee on the Judiciary was somewhat more detailed in its discussion of Section 202, but beyond anecdotal evidence, for example, that police officers had inappropriately arrested epileptics, it identified no pervasive bad conduct on the part of the states in their treatment of the disabled and did not allege that the provision was required to redress unconstitutional state conduct. *See* H.R. Rep. No. 101–485(III) at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473. The other congressional reports were similarly uncritical of the states. *See* H.R. Rep. No. 101–485(IV) at 38 (1990) (Committee on Energy and Commerce), *reprinted in* 1990 U.S.C.C.A.N. 512, 527 (no discussion of state conduct); H.R. Conf. Rep. No. 101–596 at 67-68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 576-77 (mentioning only that this provision would mandate that states provide 911 emergency telephone services to the hearing and speech impaired).

In sum, the legislative history of the ADA does not support inferences of a pattern of bad faith or bad conduct on the part of the states, let alone any contention by Congress of a need to address discrimination against the disabled as a matter of equal protection. In fact, in the very opening provision of the

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[5] The Committee's findings and testimony regarding the need for the ADA, in general, which consisted of anecdotal evidence on the hardships faced by the disabled, *see id.* at 28-34, *reprinted in* 1990 U.S.C.C.A.N. 303, 310-16, do not support a finding that states were violating the constitutional rights of the disabled. *See Boerne*, 521 U.S. at 530-31.

[6] The House Report from the Committee on Public Works and Transportation did not make any findings on the need for Section 202.

Act, Congressional Findings and Purposes, Congress signaled its understanding that the ADA and the Equal Protection Clause do not enforce the same rights:

> [U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability *have often had no legal recourse to redress such discrimination.*

42 U.S.C. § 12101(a)(4) (emphasis added). Thus, Congress acknowledged that the ADA was not specifically directed at remedying infringements of constitutional rights, for which legal recourse has been available. Indeed, the Fourteenth Amendment, as a rationale for enacting the ADA, seems to have only made its appearance in Congress' invocation of authority.

This absence of congressional findings that states were regularly infringing upon the constitutional rights of the disabled is strong evidence that Congress' purpose in enacting the ADA was not remedial in nature. *Florida Prepaid*, 527 U.S. at 642. More critically here, unlike the Religious Freedom Restoration Act at issue in *Boerne* or the Patent Act at issue in *Florida Prepaid*, the legislative history of the ADA is not primarily burdened by meager or outdated findings. *See Florida Prepaid*, 527 U.S. at 640-641; *Boerne*, 521 U.S. at 530. Rather, the findings made by Congress with respect to the ADA indicate that, rather than being indifferent or hostile to the constitutional rights of the disabled, states were making positive strides in responding to their special needs. As this Court has established that Section 5 grants Congress only a remedial power, *Boerne*, 521 U.S. at 527, this Court should find, consistent with these precedents, that the ADA is not a valid enactment under Section 5.

II

THERE IS A DEMONSTRATED LACK OF CONGRUENCE AND PROPORTIONALITY BETWEEN THE GOALS OF THE ADA AS IT HAS BEEN ENACTED AND APPLIED AND THE PROTECTIONS AFFORDED TO CITIZENS UNDER THE EQUAL PROTECTION CLAUSE

A. Various Mandates of the Act Do Not Comport with Equal Protection Requirements Identified by This Court

There can be no doubt that those with disabilities suffer "discrimination." Nonetheless, there is a marked distinction between that term as it is understood with respect to matters like race or even sex as opposed to matters like disability and age. Whereas there is little reason to suspect, in most cases, that race and sex reflect actual capabilities, age and disability *can* indicate capabilities and, in the case of the disabled, the group itself, though diverse, is *defined* by its capabilities.

This Court has held that the states have broad leeway in making judgments about the relative qualifications of those whom it hires and, presumably by extension, those to whom it offers its services, insofar as those judgments reflect rational rather than irrational presumptions. Thus, for example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court found little to object to about Missouri mandating retirement for judges when they reached the age of 70, surmising:

> The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that *physical and mental capacity sometimes diminish with age.*

Id. at 472 (emphasis added and citations omitted). If, as *Gregory* acknowledges, the Equal Protection Clause permits

age to serve as a proxy for physical and mental capacity sufficient to justify disparate treatment, there can be no doubt that physical and mental abilities themselves provide a sound basis for discrimination, at least in a constitutional sense, so long as that discrimination is not irrational.[7] Thus, in *Cleburne*, this Court established that states may discriminate against the mentally retarded, at least, so long as the discrimination is not irrational:

> [T]hose who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern . . . . They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.

Cleburne, 473 U.S. at 442.

Of course the ADA addresses the disabled, in general, and not solely those who are mentally retarded. However, the premise of *Cleburne's* conclusion that only *irrational* discrimination is unconstitutional holds equally true to other classifications based on disability. *See id.* at 442; *see also Heller v. Doe*, 509 U.S. 312 (1993) (Court applied rational basis review to state law treating the mentally retarded and the mentally ill differently). Like mental retardation, classifications based on physical or other mental disabilities often "reflect[] the real and undeniable differences between the [disabled] and others." *Cleburne*, 473 U.S. at 444. In short, differences in treatment by the states generally reflect material differences between those who have disabilities and those who do not, not merely differences based upon irrational prejudices. Consequently, where the law treats such disabled individuals

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[7] *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 316 (1976), finding that age was a constitutionally allowable proxy for determining the physical preparedness of police officers.

differently than others, the difference may be "not only legitimate but also desirable." *Id.* In such cases, the constitutional guarantee of equal protection only provides that courts will step in when the differences in treatment are illegitimate—where they are based solely upon perceptions or prejudices—rather than the realities of the physical world.[8]

But the ADA makes *any* discrimination against the disabled unlawful, regardless of whether the reason for the discrimination is sound or invidious, or whether a reason exists at all. Thus, neutral physical barriers, such as attend architectural design or transportation services, are deemed by the ADA as "discriminatory" toward the disabled simply by virtue of the fact that not all disabled individuals can easily access them. *See* 42 U.S.C. § 12101(a)(5). Indeed, with limited exception, the provision of any public services that do not affirmatively *cater to* the special needs of individuals classified as disabled under the Act is deemed unlawfully discriminatory. But this is not a remedy that the Equal Protection Clause enforces. Like age classifications, disability

> cannot be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and apathy."

Kimel v. Florida Board of Regents, 120 S. Ct. 631, 645 (2000) (quoting *Cleburne*, 473 U.S. at 440). As *Kimel* explained, "[u]nder the Fourteenth Amendment, a state may rely on age as a proxy for other qualities, abilities, or characteristics that are

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[8] Consistent with this reasoning, the lower federal courts have required only a rational basis for state actions that classify based on other disabilities besides mental retardation. *See, e.g., Mitchell v. Commissioner of the Social Security Administration*, 182 F.3d 272 (4th Cir. 1999) (alcoholic); *Hansen v. Rimel*, 104 F.3d 189 (8th Cir. 1997) (hearing impaired); *More v. Farrier*, 984 F.2d 269, 271 (8th Cir.), *cert. denied*, 510 U.S. 819 (1993) (physically disabled).

relevant to the State's legitimate interests." *Kimel*, 120 S. Ct. at 646. Since, as *Kimel* asserts, a state may legitimately rely on age as a proxy for ability, it follows that states may classify based upon ability, alone, without running afoul of the Fourteenth Amendment. But the ADA establishes as a baseline that *any* classification based on disability is unlawful and *must be* remediated. Consequently, the ADA cannot be understood to provide a remedy that is congruent and proportional to the purported constitutional injury of violating the Equal Protection rights of the disabled.

In fact, the disparity between the constitutional standard for equal protection and the standard established by the ADA is plain on the ADA's face. Whereas the Equal Protection Clause permits classifications based on disability so long as those classifications are rational, the ADA simply demands that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Public entities are subject to this demand qualified by very limited exceptions, and these exceptions do not equate to the mere invocation of a "legitimate purpose," which is all that the Equal Protection Clause requires.

For example, Title I, which relates to employment, demands that both public[9] and private employers make

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[9] Congress did not exclude the states from its definition of employers under the ADA, but did exclude the federal government. *See* 42 U.S.C. § 12111(5)(B)(i). This, alone, is some indication that there is a lack of congruence between the ADA and the constitutional obligation of equal protection, since the federal government is bound by the equal protection component of the Fifth Amendment's Due Process Clause just as states are bound by the Equal Protection Clause

(continued...)

"reasonable accommodations" for the disabled that may include:

> [J]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(B). These provisions, by their own terms, mandate more than that the state, as an employer, treat the disabled the same as the nondisabled. Though these provisions may make for sound policy, this Court has never construed the Equal Protection Clause to require special accommodations such as this in the absence of first finding that there has been an infringement of constitutional rights. But the ADA demands them regardless.

In short, the ADA creates a new remedy of entitlement even without an injury; or rather, it imputes an injury simply by virtue of the fact that an individual is disabled. Accordingly, it attempts to compensate disabled individuals for the handicaps that are a natural result of their disabilities, but that compensation is not tied to a finding of invidious or irrational discrimination by the state.

This compensation aspect of the ADA is echoed in other provisions of the Act. For example, in the area of public transportation, public entities are required to provide paratransit services to the disabled if they provide fixed-route systems, subject only to the qualification that public entities may be excused if this requirement constitutes an "undue financial

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[9](...continued)
of the Fourteenth Amendment. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

burden." *See* 42 U.S.C. § 12143(a) and (c)(4). Further, "undue hardship," as a defense to the "reasonable accommodation" requirement, is defined by reference to such factors as the cost of the accommodation, the overall financial resources of the employer, and the effect of the accommodation on expenses and resources. 42 U.S.C. § 12111(10)(B). These provisions are an explicit acknowledgment by Congress that compliance with the Act unavoidably requires states to outlay public funds to meet federal requirements. This mandated outlay of public funds to "remedy" discrimination is foreign to Equal Protection analysis in the absence of finding a constitutional violation.

Whereas most civil rights laws addressing discrimination naturally mandate that states refrain from certain conduct, the ADA demands that states engage in affirmative measures. It is, in concept, a mandated entitlement for the disabled. But the Equal Protection Clause has never been understood to require that states grant to certain classes of individuals an entitlement not available to the public in general without a showing that such a step is required to redress a past wrong. Indeed, under the Equal Protection Clause even "benign" classifications that help a class of individuals cannot survive Equal Protection analysis unless its purpose is remedial. *See Adarand*, 515 U.S. at 220-21 (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) ("'[A] public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted.'")). The ADA's statutory mandate requiring states to take the extra steps of altering its existing practices, programs, and schedules and, if necessary, purchasing special equipment and vehicles to accommodate the specific requirements of disabled individuals, grants the disabled an extraordinary entitlement. Because Congress found no evidence of states regularly engaging in invidious or irrational discrimination, and because the ADA itself does not require such a showing, the ADA cannot be characterized as a remedy

that is "congruent and proportional" to any constitutional evil sought to be redressed.

What Congress defines as "discrimination" in the ADA is indeed, in the dictionary sense, treating those who are disabled differently than those who are not. But when differences in treatment are due to very real differences in circumstance, the constitutional principle of equal protection cannot be understood to require states to take affirmative steps to erase the effects of these different circumstances. Because the ADA demands precisely this remedy, it is not congruent or proportional to the requirements of the Equal Protection Clause.

B. Claims Upheld Under the ADA Clearly Would Not Amount to Violations of the Equal Protection Clause

While it is difficult to catalogue or compartmentalize the glut of cases that have arisen under Section 202 of the ADA, a sampling of claims that have arisen under this Act document the disproportionality between the rights protected by the Equal Protection Clause and the rights Congress created with the ADA.

For example, recently, a federal district court held that a plaintiff could state an ADA claim against the governor of his state by virtue of the fact that the governor had denied state funding to certain programs directed at helping the disabled. *Lewis v. New Mexico Department of Health*, 94 F. Supp. 2d 1217 (D.N.M. 2000). Whatever the underlying merits of this claim, there is no question that the claimant in that case could never have stated an equal protection claim on the same set of facts. Despite the Fourteenth Amendment's unquestionably broad grant of power to Congress to legislate over the states, the Equal Protection Clause has never been construed to prescribe statewide budget allocations.

Other successful claims document how far beyond equal protection the ADA seeks to reach. In *Dare v. California*

Department of Motor Vehicles, 191 F.3d 1167 (9th Cir. 1999), the Ninth Circuit affirmed a lower court decision holding that California's biennial six dollar fee for a handicapped placard violated the ADA rights of the plaintiffs. The court found:

> If public entities place a surcharge on measures that help disabled people achieve . . . parity, disabled people then are paying fees others do not and so are not being treated equally.

Dare, 191 F.3d at 1176. This is a peculiar twist of reasoning, given that the fee was no more than the cost of the placard and the placard granted to disabled individuals *special* privileges, such as the ability to park in specially designated spaces and exemption from certain other parking restrictions, that are plainly unavailable to the nondisabled.

In *State of West Virginia ex rel. Lambert v. West Virginia State Board of Education*, 191 W. Va. 700 (1994), the ADA was held to require that a county board of education provide a signer for a deaf student for the school-sanctioned activity of extra curricular basketball. And in *Anderson v. Department of Public Welfare*, 1 F. Supp. 2d 456 (E.D. Pa. 1998), a federal district court held that the ADA mandates that medical assistance providers provide Braille, large print, and audiotape formats of all managed care information to enable those with visual impairments to obtain necessary care information. Further, in *Heather K. v. City of Mallard*, 946 F. Supp. 1373, 1387 (N.D. Iowa 1996), a federal district court held that a city could be held liable under Section 202 of the ADA for failing to pass an ordinance prohibiting open burning, where the smoke caused by these private activities negatively impacted a child with respiratory ailments.

In sum, ADA cases repeatedly demonstrate that the "remedy" created by Congress is in fact a benefit program that

requires much more than what the Equal Protection Clause demands. The ADA is not a directive to the states to suppress irrational, and therefore unconstitutional, discrimination. Rather, it is a directive to the states to expend material and significant efforts and resources to help the disabled overcome the negative impacts of their disabilities—to create, as it were, a society in which the disabled are, as a practical matter, no longer disabled. But while this ambitious vision may be worthy of our noblest efforts, and may even be achievable, it bears little resemblance to the vision of equal protection espoused by the Constitution.

For this reason, the ADA cannot be understood as congruent and proportional to the Equal Protection guarantee of the Fourteenth Amendment. Accordingly, because the ADA is not a valid enactment under Section 5 of the Fourteenth Amendment to enforce constitutional rights, Congress lacked authority in the ADA to abrogate the State of Alabama's sovereign immunity.

CONCLUSION

The ADA advances a policy that Americans can be proud to espouse. It is indicative of the good will, optimism, and innovation of the American people, who have shown through the ADA their willingness to help the disabled overcome not only ignorant and uncharitable attitudes, but the very real and daunting challenges that their disabilities present. But good will is not a constitutional entitlement and, as a matter of constitutional law, Congress has no power to make the states promote it under Section 5 of the Fourteenth Amendment.

Because the ADA is not a valid Section 5 enactment, Congress may not abrogate a state's sovereign immunity to

enforce its provisions. For this reason, Amicus respectfully requests that this Court REVERSE the decision of the court below, and DISMISS this suit.

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Respectfully submitted,

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